



---

---

## WESTERN FORESTRY LEADERSHIP COALITION

---

---

### LEGISLATIVE & POLICY UPDATE

November, 2010

Brent Keith, Governmental Affairs Director: 303.445.4366, [brent.keith@colostate.edu](mailto:brent.keith@colostate.edu)

The *Western Forestry Leadership Coalition (WFLC) Legislative & Policy Update* provides information on issues of importance to the WFLC and our partner groups. This document is posted at [www.wflcweb.org/infomaterials/issue\\_briefs.php](http://www.wflcweb.org/infomaterials/issue_briefs.php). Please note that the items below highlight only a few of the issues the WFLC is currently tracking.

#### **1. Stewardship Contracting**

The WFLC recognized the importance of stewardship contracting in a Joint Policy Statement with the Intertribal Timber Council in 2009 ([http://www.wflccenter.org/news\\_pdf/314\\_pdf.pdf](http://www.wflccenter.org/news_pdf/314_pdf.pdf)). The primary goals of stewardship contracting are to improve forest and rangeland health through the development of sustainable rural communities, to restore and maintain healthy forest ecosystems, and to provide a continuing source of local income and employment. Stewardship contracting has recently received attention as one of the tools available to work toward Secretary Vilsack's vision for America's forests. While stewardship contracting is not inherently an "all-lands" tool, it is a tool that has led to concrete outcomes on the ground and work completed under the program compliments other important work being completed across management boundaries.

The current stewardship contracting authority is set to expire at the end of September, 2013. The Council of Western State Foresters (CWSF) will continue to work with partners to seek permanent authority for stewardship contracting. Permanent authority will, beyond relieving the need to continually seek to reauthorize the program, bolster the program as an institutionalized tool and remove uncertainty surrounding how long the program may or may not be available.

#### ***Stewardship Contracting Cancellation Liability***

In addition to working toward permanent authority, further changes to the current stewardship contracting authority are needed to address the cancellation liability issue on multi-year stewardship contracts. Under the Federal Property and Administrative Services act of 1949, the USFS must obligate the potential cancellation ceiling liability in the year in which a multi-year contract is awarded. The cancellation liability amount must be sufficient to cover any costs that a contractor could claim as damages should the government cancel a multi-year contract due to lack of appropriations. To date, the agency has never cancelled a multi-year stewardship contract for this reason. Requiring the full cancellation liability amount to be set aside can be prohibitively expensive and creates a disincentive to enter into multi-year stewardship contracts.

The cancellation liability is separate from other contractual damages that may be available to a contractor in the event the agency breaches all or a portion of a contract for reasons such as changed conditions, failure to complete requisite NEPA documentation, et cetera. Such contractual claims are typically covered by a termination for convenience clause. Several potential administrative and legislative options exist that could alleviate the burden of the cancellation liability requirement for multi-year contracts while continuing to ensure that contract obligations are met.

### ***Long-Term Stewardship Contracts***

Some groups are pushing to authorize stewardship contracts for a term greater than the current allowed 10 years. The push to allow longer term contracts is based on the premise that 10 year contracts may not provide sufficient opportunity for development and retooling of infrastructure. Discussions are continuing around the feasibility of offering 15 to 20 year stewardship contracts on a limited basis as a test of their effectiveness.

The CWSF will continue to work towards achieving a permanent authority for stewardship contracting and to explore options to address the issues of cancellation liability and the potential for longer term contracts.

## **2. Ninth Circuit Stormwater Runoff Decision**

In August the U.S. Court of Appeals for the Ninth Circuit issued an opinion in *Northwest Environmental Defense Center v. Brown*, available at <http://www.ca9.uscourts.gov/datastore/opinions/2010/08/17/07-35266.pdf>, wherein the court held that a National Pollution Discharge Elimination System (NPDES) permit is required for stormwater runoff from logging roads on the Tillamook State Forest in Oregon. The Ninth Circuit overturned the District Court's decision to grant defendants' motion to dismiss and held that logging activities and the associated roads fall within the definition of "industrial activities" and as such are subject to Phase I stormwater permitting under NPDES. Under the court's interpretation, stormwater runoff collected and conveyed through ditches and culverts before being discharged into navigable waters constitutes a point source under the Clean Water Act.

The court's decision leaves many questions unanswered, including the remaining viability of the Environmental Protection Agency's (EPA) Silvicultural Rule which had exempted such discharges from NPDES permitting requirements, and what actions EPA will take following the decision. Defendants have petitioned the Ninth Circuit for a rehearing *en banc*. The petition for rehearing is discretionary and not commonly granted. If the court grants a rehearing, the matter would be considered in its entirety by a panel of 11 judges from the Ninth Circuit. Should the request for rehearing be denied, the defendants' remaining option would be to seek review of the case by the Supreme Court of the United States, which is also at the discretion of the Court.

## **3. FY 2011 Appropriations**

Just prior to the close of FY 2010 and before adjourning for the midterm elections, the Congress passed a Continuing Resolution (CR) to provide funding for the federal government at FY 2010 levels. The current CR expires on December 3<sup>rd</sup> and it appears unlikely that individual appropriations bills or an omnibus bill will be approved before that time. As such, an additional

CR will be necessary to extend funding for the federal government beyond December 3<sup>rd</sup>. The duration of a future CR or budget is still an open question; however the current Congress may seek to move a CR that extends well into or through FY 2011.

#### **4. Biomass Definition**

While it appears unlikely that a comprehensive Climate and Energy Bill will be approved by the Congress during the lame duck session or in the 112<sup>th</sup> Congress slated to be seated in January, potential remains for scaled back and targeted legislation on smaller portions of climate and energy issues. One such possibility is the creation of a renewable energy standard. Two bills in the Senate are of particular interest, one would establish a Renewable Electricity Standard and the other a Clean Energy Standard.

- Renewable Energy Standard (RES) legislation, sponsored by Senator Bingaman (D-NM) was introduced in the Senate in late September, 2010. The bill has garnered the support of 32 co-sponsors since its introduction. Importantly, this RES legislation contains a problematic biomass definition that would substantially limit the types of woody material that would qualify as renewable energy sources under the biomass definition.
- Clean Energy Standard (CES) legislation, sponsored by Senator Graham (R-SC) was introduced in the Senate in late September, 2010. To date, Senator Graham's bill has not received the same level of support as the RES legislation. The CES legislation contains a biomass definition that is consistent with the 2008 Farm Bill definition.

The CWSF has been working closely with partners to address concerns over the biomass definition in the RES legislation as it relates to materials harvested from both private and public lands and will continue to monitor both the RES and CES legislation as the Congress reconvenes.

#### **5. Farm Bill**

The CWSF is an active participant in the Forests in the Farm Bill Coalition which is comprised of a diverse group of conservation groups, forest landowners, industry, academia and community organizations. This coalition is looking to build upon the success of forestry programs in the 2008 Farm Bill with the goal of ensuring that forests retain an important seat at the table in 2012 Farm Bill discussions. The coalition is currently working to develop a platform and is exploring other areas such as improving the provision of technical services to landowners and the role of State Wildlife Action Plans and State Forest Resource Assessments and Strategies in the 2012 Farm Bill.

Additionally, the CWSF has developed a Farm Bill platform based around the recommendations in the WFLC *Threats to Western Private Forests: A Framework for Conserving and Enhancing the Benefits from Private Working Forests in the Western U.S.* This platform will be the basis of the CWSF's discussions with partner groups on Farm Bill programs.

## **6. Collaborative Forest Landscape Restoration**

In its first year, the Collaborative Forest Landscape Restoration (CFLR) program received strong interest with nearly 100 project proposals developed by stakeholders from across the country. These proposals were submitted to the USFS regions who in turn nominated 30 of the landscape projects for consideration by the Secretary. In June of this year the Secretary of Agriculture announced the selection of a 15 member advisory committee charged with evaluating CFLR proposals for funding. The advisory committee was established under the Forest Landscape Restoration Act and is comprised of a diverse group of individuals selected based on technical expertise, viewpoint represented, geographic representation and diverse backgrounds. Ultimately, 10 projects were selected to receive funding in the first year.

The program was funded at \$10 million in FY 2010 and the President's Budget requested \$40 million for the program in FY 2011. The program has received wide support as a catalyst to engage the public in a more productive way in the management of national forests. The CWSF supported sufficient funding for the Forest Landscape Restoration Act to initiate a credible national program in the first year that can grow in subsequent years ([http://www.wflccenter.org/news\\_pdf/333\\_pdf.pdf](http://www.wflccenter.org/news_pdf/333_pdf.pdf)).

Please contact Brent Keith, Governmental Affairs Director, at 303.445.4366 or [brent.keith@colostate.edu](mailto:brent.keith@colostate.edu) with any questions.

#####END#####